

Legal Challenges of Intellectual Property and Copyright Protection of Online and Digital Data in Nigeria*

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Abstract

When God created the framework of the earth with all its appurtenances, he gave man the freedom to re-design its contents as preferred. The world as it looks today is therefore the result of man's recreation prowess. But while some bury themselves in the genuine labour of making the world a better place for mankind and the generation to come, some in lazy manners always lurk around the corner, waiting to reap where they did not sow by stealing the glory of another man's work. The resultant solution to this is the emergence of copyright ownership rights and intellectual protection laws. The primary function of copyright law and the law of intellectual property is therefore to protect the fruits of a person's work from annexation by another. This paper traced the origin of intellectual property and copyright, its development and the existing legal protection for intellectual property and copyright ownership in Nigeria vis-à-vis the various challenges still defying legal protection of online and digital materials by the existing legal framework. At the end of this paper, it was suggested that there is need to bring the Nigerian laws to speed in meeting the challenges of protecting online and digital materials.

Keywords: Intellectual Property, Online Data, Digital Data, Protection, Legal Challenges, Copyright.

1. Introduction

In the Biblical account of the creation of man and the development of mankind, it was recorded that God made man in His own image and endowed man with great powers and imagination, greatest of which is the power of recreation. Though God created the framework of the earth with all its appurtenances, he gave man the freedom to re-design its contents as preferred.¹ The world as it looks today is therefore the result of man's recreation prowess. But while some bury themselves in the genuine labour of making the world a better place for mankind and the generation to come, some in lazy manners always lurk around the corner, waiting to reap where they did not sow by stealing the glory of another man's work. The resultant solution to this is the emergence of copyright ownership rights and intellectual protection laws. The primary function of copyright law and the law of intellectual property is therefore to protect the fruits of a person's work from annexation by another.

Protection of copyright ownership and intellectual property has therefore in the present age becomes of immense importance to man especially specialists and professionals who spend a long time and immense resources acquiring the requisite skills to create an output. Actors, playwrights, performers and other artistes, musicians, composers and songwriters, authors, publishers, newspaper proprietors and librarians, architects, designers, lawyers and editors of law-reports, doctors, pharmacists, engineers and other professionals, lecturers, professors, educational institutions especially of higher learning, broadcasters, photographers, video-graphers and makers of cinematograph films, producers of computers and electronic systems especially their numerous

¹ See the Account of this in The Holy Bible, Genesis, Chapter 1 verses 27-30.

softwares etc are all affected and endangered in this act of intellectual stealing.

This problem has never stared us in the face like in the present age when with a single click on the internet, mammoth data containing intellectual labour of a lifetime may be stolen with no trace. It is therefore intended in this paper to examine the existing legal protection for intellectual property and copyright ownership in the area of e-learning or e-schooling *vis-à-vis* the various challenges still defying legal protection or yet untackled by the existing legal framework.

Conceptual Analysis of Intellectual Property and Copyright

On a broad perspective, Intellectual Property means the legal rights which are derived from intellectual activity in the industrial, scientific, literary and artistic fields.¹ All over the world, countries enact laws to protect intellectual property for two main reasons. The first reason is to give statutory expression to the moral and economics rights of creators in their creation and rights of the public in access to those creations. The second reason is to promote, as a deliberate act of Government policy, creativity, dissemination and application of its results and to encourage fair trading which would contribute to economic and social development. Intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use of those productions. Those rights do not apply to the physical objects in which the creation may be embodied but instead to the intellectual creation as such. Intellectual property is traditionally divided into two branches namely industrial property and copyright.

There are plethoras of International Laws regulating and protecting copyright.² The Convention establishing the World Intellectual Property Organization (WIPO), concluded in Stockholm on 14th July, 1967 provides that Intellectual Property shall include rights relating to:³

- i. Literary, artistic and scientific work;
- ii. Performances of performing artists, phonograms and broadcasts;
- iii. Inventions in all fields of human endeavours;
- iv. Scientific discoveries;
- v. Industrial designs;
- vi. Trademarks, service marks and commercial names and designations; and,
- vii. Protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.⁴

The areas mentioned as literary, artistic and scientific work belong to the copyright branch of intellectual property. The areas mentioned as performances of performing artists, phonogram and broadcasts are usually called “related rights” that is rights related to copyright. The areas mentioned as inventions, industrial designs, trademarks, service marks and commercial names and designation constitute the industrial property branch of

¹ WIPO, World Intellectual Property Handbook: Policy and use: Handbook on what is Intellectual Property. WIPO Publication No. 450 (E)

² This includes the *Berne Convention for the Protection of Literary and Artistic Works* 1886, opened for signature 4 May 1886, ATS 1972 No 13 (entered into force 5 December 1887) (*‘Berne Convention’*), the *Agreement on Trade-related Aspects of Intellectual Property Rights* (*‘TRIPS Agreement’*), opened for signature 15 April, 1994, 1869 UNTS 299 (entered into force 1st January, 1995). This Agreement sets minimum standards for intellectual property protection in signatory countries, the *World Intellectual Property Organization* (*‘WIPO’*) *Copyright Treaty*, opened for signature 20th December, 1996, 36 ILM 65 (entered into force 6th March, 2002), the *WIPO Performances and Phonograms Treaty*, opened for signature 20th December, 1996, 36 ILM 76 (entered into force 20th May, 2002), and the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*.

³ Article 2 (viii) WIPO Convention (Concluded in Stockholm on July 14, 1967).

⁴ WIPO, World Intellectual Property Handbook: Policy and use *Op cit.* p.3.

intellectual property. The area mentioned as protection against unfair competition may also be considered as belonging to the branch, more so as Article (2) of the Paris Convention for the protection of Industrial Property (Stockholm Act of 1967) (the “Paris Convention”) includes “the repression of unfair competition among the area of “the Protection of Industrial Property”. The said Convention provides that any act of competition contrary to honest practices in industrial and commercial field constitutes an act of unfair competition.

‘Industrial property’ as a concept covers inventions and industrial designs. Simply stated, inventions are new solutions to technical problems and industrial products.¹ Industrial property includes trademarks, services marks, commercial names and designations, including indications of source and appellations of origin, and protection against unfair competition. Here, the aspect of intellectual creations although existent, is less prominent, but what is important here is that object of industrial property typically consists of ‘signs’ transmitting information to consumers, in particular as regards products and services offered on the market, and that the protection is directed against unauthorized use of such signs which is likely to mislead consumers.

Copyright is concerned with the negative right of preventing others from copying works of intellect.² This is not concerned with the reproduction of the ideas, but with the reproduction of the form in which ideas are expressed. Originally, copyright law was concerned with the field of literature and the arts, but seeking to keep up with development in technology, the protection given by copyright has been expanded over the years. Today copyright covers such works as computer programs being protected as literary works, sound recordings, films, broadcasts, cable programmes, cinematographic works, and they are all described as intellectual property. Copyright gives the owner the right to do certain things in relation to the work, which includes making a copy, broadcasting or giving a public performance. Anyone else who does any of these things (known as the acts restricted by copyright) without the permission of the owner, infringes copyright and may be subject to legal action taken by the owner for that infringement.³

Copyright gives rise to two forms of rights:

- i. The proprietary or economic right in the work, for example the right to control copying, and
- ii. Moral rights which leave the author (or principal director of a film) who may no longer be the owner of the copyright, with some control over how the work is used or exploited in the future.

International protection of copyright work is effected mainly through two international conventions namely; the Berne Copyright Convention of 1886 and the Universal Copyright Convention of 1952, both of which lay down minimum standards of protection to be attained and for reciprocity of protection between those countries that are signatories to the convention. Thus a foreigner can take legal action in the U. K. for copyright infringement occurring there as if he were a British subject.⁴

Brief Historical Origin and Development of Intellectual Property and Copyright Laws

Copyright was developed in the early modern period as a response to the growth of the printing technology that facilitated the rapid multiplication and distribution of copies of written works. Developments in the law has continued to be driven by technological advancement in the means by which works can be presented to the public at large and protection has been extended and adapted to cover photography, cinematography, sound

¹ Wipo Intellectual Property Handbook *op.cit.*

² Copinger & Skone James (1999) *Copyright Law*, Sweet and Maxwell (13th ed).London

³ Bainbridge D. I. (2012) *Intellectual Property* (9th Ed) Pearson, U. K. P.3

⁴ Bainbridge D. I. *op.cit.*

recording, broadcasting, cable transmission, computer programs, and most recently, the internet.¹

Two world views have been expressed on the justification for copyright protection. First is the Anglo-American or common law tradition, which emphasized the economics role of copyright. This right grants authors and creators of work the right to economic gains from works by themselves, through outright transfer, or by license at a price. In contrast, the second view of the European or civil law tradition sees copyright as springing from creator of the subject matter. This is known as “author-law.” Protection is given out of respect for the individual’s creative act of production and extends beyond the mere economic to the moral rights,’ the right to be identified as the creator of the work and the right to have the integrity of the work preserved.

In Nigeria, the copyright law evolved from the English law. A proper discourse on Nigeria copyright law invariably must begin with recourse to the English jurisdiction. The emergence of English Copyright law was aptly summarised by Babafemi when he said;²

The notion that an author should have an exclusive copyright in his creation took firm shape at the beginning of the eighteenth century. It derived from a confusion of earlier strains and there was still a major evolutionary conflict to come before its modern form was finally fixed.

From the early years of the first copying industry –printing- a pattern of exploitation had been developing: an entrepreneur, whose calling was typically that of “stationer”, became the principal risk-taker; he acquired the work from its author (if he was not reprinting a classic) and organized its printing and sale. The stationers (forefathers of the modern publisher) were the Chief proponents of exclusive rights against copiers....

In this objective the stationers early found an ally in the Crown. In 1534 they secured protection against the importation of foreign books; and in 1556, (Queen) Mary with her acute concern about religious opposition granted the stationers’ company a Charter. This gave a power, in addition to the usual supervisory authority over the craft, to search out and destroy books printed in contravention of statute or proclamation. The company was thus enable to organize what was in effect a licensing system by requiring lawfully printed books to be entered in its register. The right to make an entry was confined to company members, this being germane to the very purpose of the charter. (The) Stationers’ Company licensing had considerable vitality.... The stationers who had argued forcefully against their loss of protection were left with such claim to “copy-right” as they could make out of their own customary practices surrounding registration.³

The need for definite substantive rights and for effective procedure to enforce them was reflected in the legislation secured by stationers in the reign of (Queen) Anne, the Copyright Act of 1710. The sole right and liberty of printing books that the Act conferred was given to authors and their assigns, enforcing the rights depended upon registering the book’s title before publication with the Stationer’s company. The right lasted for 14 years from first publication, but if the author was still living at the end, the right was returned to him for another 14years.⁴ Other copy-rights were expressed to be unaffected by the Act.

Apart from Printers who succeeded in protecting their works as stated above, the Engravers also succeeded

¹ Hector M., Charlotte W. and Graeme L. (2008) *Contemporary Intellectual Property*. (London: Oxford University Press) 41- 42.

² Quoting from among others, Cornish and Llewelyn on Intellectual Property, 5th edition, pp345-350.

³ Babafemi, F.O. (2006). *Intellectual Property: the Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs in Nigeria*. 1st ed., (Ibadan: Justinian Books Ltd.) 1-2.

⁴ Section 11, Copyright Act, 1710

in securing legislative protection in 1734-1766.¹ Textile designers secured some very temporary protection by statutes which were the precursors of the present registered design system.² In 1798 and 1814, Sculptures were protected and eventually, the Fine Arts Copyright Act 1862 brought in paintings, drawings and photographs. In this instance, the term was the author's life and seven years.³ In 1814, the term of the statutory right in published books was extended to 28 years or the author's life, whichever was longer.⁴ In 1842, the period was extended to 42 years or the author's life and seven years, whichever was longer.⁵ This was the position until the international pressures obliged the Parliament to revise its views.⁶ In 1911, the first British legislation to bring the various copyrights within a single text, and at the same time to vest rights even in unpublished works on a statutory footing.

The Legal Regime for the Protection of Intellectual Property and Copyright in Nigeria

In Nigeria, infringement of Copyright was governed until 1970 by the English Copyright Act of 1911 which was made applicable to Nigeria.⁷ Although, a new Copyright Act was enacted in England in 1956, Nigeria continued to apply the 1911 Act until 1970 when the Copyright Act was promulgated as Decree No. 61 of 1970.⁸ The Act was however found to be very defective in many aspects. Under the 1970 Act, literary, musical and artistic works lasted for only 25 years after the end of the year in which the author died. Cinematograph films and photographs also lasted for 25 years after the end of the year in which the work was first published. As regards sound recordings and broadcast, copyright also lasted for only 25 years after the end of the year in which the recording was made or the broadcast took place.

These periods were ridiculously low and unreasonable. However, in 1988, a new Copyright Act was enacted which extended these statutory periods⁹ and same was embodied in the Laws of the Federation, 2004. In the area of administration of the law, there was no effective administrative structure under the 1970 Act, the 1988 Act has however reversed this trend. There is now an administrative body, known as the Nigerian Copyright Commission, vested with the general duty of ensuring proper implementation of the law. The 1988 Act also established a Governing Board for the Commission¹⁰ and provided for the Copyright Licensing Panel.¹¹

Where there is infringement of copyright, the 1970 Act made provisions only for civil suit against the transgressor at the instance of the owner of the copyright. The criminal sanction was very minimal. However, under the 1988 Act, the owner of the copyright can bring a civil suit against the infringer¹² whilst the Copyright Commission can also bring a criminal action against the infringer simultaneously.¹³ The sanctions are therefore heavier than what existed in the previous dispensation.

On enforcement of the Act, the combine provisions of the 1988 Act and its amendments of 1992 and 1999

¹ See Engraving Copyrights Acts 1734 and 1776 with further amendments in 1777 and 1836. The term was 28 years.

² The 1787 Act gave protection against the printing, working or copying of an original pattern for certain types of textile. The duration was only for two months from publication, though it was extended in 1794 to 3 months.

³ See Bently in McClean and Schubert, *Dear Images*. (2002) 331-334

⁴ Section 4, Copyright Act, 1814.

⁵ Section 3, Literary Copyright Act, 1842.

⁶ Babafemi, F.O. *op.cit.*

⁷ By virtue of an Order-in-Council, no. 912 of 24th June, 1912, made pursuant to section 25 of the Copyright Act of 1911 of Great Britain.

⁸ It came into operation on the 24th December, 1970.

⁹ See the First Schedule, Copyright Act, Cap C28, LFN 2004.

¹⁰ See Section 35 of the Act.

¹¹ See Section 37 of the Act.

¹² See Section 16 of the Act

¹³ Section 24 of the Act.

now allow the appointment of Copyright Inspectors with the same powers as the Police.¹

On the eligible works covered by the Nigerian Copyright Act of 1988 and its subsequent amendments, the Act define ‘work’ to embrace literary, musical and artistic works, cinematograph films, sound recordings and broadcasts.² The Act further clarifies these works as follows;³

- a. **Literary Work** which includes, irrespective of literary quality, any of the following works or works similar thereto:
 - i. Novels, stories and poetical works;
 - ii. Plays, stage directions, film scenarios and broadcasting scripts;
 - iii. Choreographic works;
 - iv. Computer programmes;
 - v. Text-books, treatises, histories, biographies, essays and articles;
 - vi. Encyclopaedias, dictionaries, directories and anthologies;
 - vii. Letters, reports and memoranda;
 - viii. Lectures, addresses and sermons;
 - ix. Law reports, excluding decisions of courts; and,
 - x. Written tables of compilations.
- b. **Musical Work** which means any musical work, irrespective of musical quality, and includes works composed for musical accompaniment.
- c. **Artistic Work** which includes, irrespective of artistic quality, any of the following works or works similar thereto-
 - i. Paintings, drawings, etchings, lithographs, woodcuts, engraving and prints;
 - ii. Maps, plans and diagrammes;
 - iii. Works of sculptures
 - iv. Photographs not comprised in a cinematograph film;
 - v. Works of architecture in the form of buildings, models and
 - vi. Works of artistic craftsmanship and also (subject to S.1(3) of the Act) pictorial woven tissues and articles of applied handicraft and industrial art.
- d. **Cinematograph Film**⁴ which includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film.
- e. **Sound Recording** which is defined as the first fixation of a sequence sound capable of being perceived aurally and of being reproduced but does not include a sound track associated with a cinematograph film.
- f. **Broadcast** which is defined as sound or television broadcast by wireless telegraphy or wire or both or by satellite or cable programmes and include re-broadcast.

It is important to note that no ‘work’ will attract the term or be registered as ‘copyright’ unless it falls

¹ Section 38 of the Act.

² See Section 1(1) of the Act.

³ Babafemi, F.O. *op.cit* at pg. 7.

⁴ See Section 51 of the Copyright Act, Cap C28, LFN 2004

within the above classification.¹ It should also be noted that the Copyright Act further states² that a literary, musical or artistic work shall not be eligible for copyright unless-

- a. Sufficient effort has been expended on making the work to give it an original character;
- b. The work has been fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine device.

Remedies available for the infringement of copyright are damages (general, special, exemplary and nominal), injunction (interim, interlocutory and perpetual), Anton Pillar Order, account of profits and right of conversion.

Challenges in Application of the Copyright Act to Online and Digital Materials in Nigeria

Online materials are the materials which are available through the aid of interconnected computer networks which may be limited to a local area or worldwide while Digital data simply refers to all those technologies that make use of information transmitted by means of discrete values using the binary system (combination of 1 and 0) rather than at continuous range.³ Over 47 years ago,⁴ the Court in Nigeria had taken notice and stressed the importance of computer, especially in commercial transactions when it said the law cannot be and is not ignorant of modern business methods, and must not shut its eyes to the 'mysteries' of the computer. That was at a time in Nigeria when laptop computer was relatively unknown, desktop computer known to very few who were educated and existed only in the imagination of even many of the educated Nigerians, and handheld computer and phones which can today be found being used by a six-year old Nigerian child could never had been thought possible. No wonder the Court in the above mentioned case called it a 'mystery.'

Since the beginning of the 20th century, the world has continued to experience astronomical advancement in scientific and technological innovations which have changed the face of modern society, leading many thinkers to term this present civilization 'the jet age'. This technological advancement has had enormous impact on the world's legal systems, disrupting traditional modes of protection of intellectual property, and has left the law completely in a state of flux, literally gasping to catch pace with the ever changing forms of innovations. In Nigeria, the life of every average citizen now revolves around one or more of these technologies, such as computers including palmtops and hi-tech phones, satellite and cable receivers/signals, facsimile transmissions and the perpetually growing internet. Thus, for instance, unlike the United States of America which has recognized the need to accord special protection to 'digital works' (a new species of traditional innovation that straddle sound and picture electronic signals) by the enactment of several legislations including the Digital Millennium Act of 1998, Nigeria has only succeeded in recopying the 1990 Copyrights Act into the 2004 version of the Laws of the Federation of Nigeria.

Despite the immense benefit derived from the Copyright Act and its efforts at protecting ingenuity and products of creativity, Nigeria has been bedevilled by challenges in protecting online products especially online education materials and other e-learning products. This is according to a writer,⁵ due to a number of factors,

¹ Babafemi, F.O. *ibid.* at pg.10

² See Section 1(2), Copyright Act, Cap C28, LFN 2004

³ Null Linda *et al* (2006). *The Art of Digitalization* (2nd ed. Cambridge University Press), p. 471

⁴ In *Esso West Africa v Oyegbola* (1969) 1 NMLR, (Pt. 194) p. 1986.

⁵ Faga, H.P. and Ole, N. () Limits of Copyright Protection in Contemporary Nigeria: Re-Examining the Relevance of the Nigerian Copyright

essentially bordering on the obsolescence and inability of the Act to meet contemporary challenges in the protection of copyrights of particularly new genres of innovations within the above broadly provided products. Also, though Nigeria is signatory to various international conventions on copyright protection as discussed earlier,¹ these conventions are hardly enforceable in Nigeria owing to the fact that they have not been domesticated.

Other challenges affecting the protection of copyright of online and digital data are summarised below;

- i. It is worrisome that digital technology in their varied forms and continuous growth was not expressly contemplated for protection under the Nigerian Copyright Act. However, most of the new digital innovations are being accommodated in some form under the Act if they approximately fall under any of the earlier mentioned six genres protected under the Copyright Act. It is therefore important that this challenge be addressed by amending the existing law to resolve this logjam or enact a new law to directly address protection of online and digital materials which oftentimes are the bedrock of e-learning programmes.
- ii. Various International laws and Instruments specifically protect copyright of digital broadcast and other online materials though not without inadequacies in some areas. However, despite the fact that Nigeria is a signatory to some of these conventions, many of them are not applicable until they are domesticated. It is therefore difficult to enforce these undomesticated laws and the resultant effect is that where copyrighted products and services from another country find their way into Nigeria, access to such materials is had without due regards to the existing copyright from the originating country.
- iii. On the position of computer programmes and their protection under the Nigeria Copyright Act, the Act provides that before a computer programme qualifies for protection, it must pass the test of originality and must be fixed in a definite medium of expression. The analysis of this provision shows that many modern innovations may not fit into the requirement. Most computer programmes in their configuration involve computer language created by different programmers different from the interface which may be created by another person. It is noteworthy that as far as Nigeria is concerned, the creator of a computer language is not entitled to a separate copyright on the language alone under the Copyright Act. This is not the situation in the United States of America.
- iv. Lastly, the methods through which computer and online works are being pirated may not amount to infringements under our Copyright Act. For instance, we have a form of copyright infringement of computer software known as re-bundled software which is the assembling of diverse parts of legitimate software components by technical means and re-bundling these different parts manufactured by different companies and giving it the name of a major software company. The aftermath of the whole story is that recent technological advancements have actually exposed the loopholes of copyright protection, especially in Nigeria.

Concluding Remarks and Recommendations

It was reported by the Nigerian Law Intellectual Property Watch on its online page² on the 10th January, 2018 that one Amos Abutu signed a Press Release on behalf of the Nigerian Copyright Commission that the Nigerian

Act in Today's Digital and Computer Age.

¹ See footnote 3 *supra*.

² Nigeria: Federal Executive Council Approves Copyright Bill. Accessed from <https://nlipw.com> on 26/03/2018

Federal Executive Council in a meeting presided over by President Muhammadu Buhari approved a new Copyright Bill. The approval was reportedly given on Thursday, 21st December, 2017 and the Attorney General for the Federation was noted to have said the FEC has sent the Bill to the National Assembly for consideration and passage into law and eventual assent by the President if passed. He stated that the approved Copyright Bill is a product of the on-going reform of the copyright system launched in November 2012, initiated by the Director General of the Nigerian Copyright Commission (NCC) Mr. Afam Ezekude.

According to the NCC, the Bill is aimed at repositioning Nigeria's creative industries for greater growth; strengthen their capacity to compete more effectively in the global marketplace; and enable Nigeria to fully satisfy its obligations under the various international copyright instruments. It is therefore hoped and recommended in concluding this paper, that this new Bill under consideration, address all the above mentioned challenges.

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